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No. 99-71

In the Supreme Court of the United States

JAMES H. KOSTMAYER, JR. AND ROBERT I. LAWSON,
PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 922(g)(1) of Title 18 of the United States Code prohibits convicted felons, such as petitioners, from possessing any firearm in or affecting commerce. The question presented is whether that prohibition, as applied to petitioners, violates the Second Amendment, the Ninth Amendment, or the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 178 F.3d 1291 (Table). The decision of the district court (Pet. App. 3a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1999. The petition for a writ of certiorari was filed on July 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 18 U.S.C. 922(g)(1), it is "unlawful for any person * * * who has been convicted in any court of a crime punishable by imprisonment for a term exceeding

one year * * * [to] possess in or affecting commerce, any firearm or ammunition." Section 925(c) authorizes the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF) to lift that prohibition if, after an investigation, "it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c).

In each of the annual ATF appropriations bills enacted since 1992, however, Congress has barred ATF from employing any appropriated funds "to investigate or act upon applications for relief" under Section 925(c). *E.g.*, Pub. L. No. 105-277, 112 Stat. 2681, 2681-485 (1998).[1] Concerned that an ATF determination to grant relief "could have devastating consequences for innocent citizens if the wrong decision is made," Congress has concluded that ATF's scarce resources "would be better utilized" on more pressing matters, such as suppressing violent crime. S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993); S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992); see also H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

2. Petitioner Kostmayer was convicted in 1994 of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and petitioner Lawson was convicted in 1993 of submitting a false tax return, in violation of 26

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[1] Accord Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996); Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993); Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

U.S.C. 7206(1). Those federal felony convictions subject petitioners to the firearms disability set forth in Section 922(g)(1). See Pet. App. 23a-25a. Both petitioners filed applications for relief under Section 925(c). ATF informed petitioners that, in light of Congress's restriction on the use of appropriated funds, it could take no action on their applications. *Id.* at 13a-14a, 20a-21a.

Petitioners then filed this action in district court. Pet. App. 22a. In their complaint, they sought a writ of mandamus compelling ATF to consider their applications and, alternatively, a declaratory judgment that 18 U.S.C. 922(g)(1) and 925(c), as applied to them, violated the Second Amendment. Pet. App. 22a. According to the complaint, petitioners, both of whom reside in Louisiana and were convicted there, had each received pardons from the Governor of that State restoring their civil rights in connection with the conduct underlying their federal crimes. *Id.* at 22a-28a.

In April 1998, the district court ruled for the government. Pet. App. 4a-5a. The court reasoned that, "[i]nsofar as plaintiff[s] seek[] relief from the firearm disabilities created by 18 U.S.C. 922(g)(1) through an order directing the Bureau of Alcohol, Tobacco and Firearms to grant petitioners' applications for relief from those disabilities, this court lacks jurisdiction." *Id.* at 4a. The court then rejected petitioners' constitutional claim on its merits, explaining, *inter alia*, that "it is irrelevant that plaintiffs have each received a pardon from the governor of Louisiana restoring their civil rights, including the right to bear arms. A state pardon cannot relieve an individual of the * * * effects of a federal conviction." *Id.* at 5a.

The Fifth Circuit affirmed in an unpublished, *per curiam* order, relying on "essentially the reasons assigned by the district court." Pet. App. 2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals or of this Court. Further review is therefore not warranted.

1. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *United States* v. *Miller*, 307 U.S. 174 (1939), this Court rejected a Second Amendment challenge to a federal indictment for possession of a sawed-off shotgun, reasoning that the Second Amendment creates no right to possess such a weapon in the absence of "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* at 178. The Court reaffirmed that holding in *Lewis* v. *United States*, 445 U.S. 55, 66 (1980). And, as petitioners recognize, the courts of appeals have interpreted this Court's precedent "to hold that the Second Amendment creates only a 'collective' right in the states to keep and bear arms rather than an individual right." Pet. 11 (citing *Hickman* v. *Block*, 81 F.3d 98, 100-101 (9th Cir.), cert. denied, 519 U.S. 912 (1996); *Love* v. *Pepersack*, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813 (1995)); see also *Gillespie* v. *City of Indianapolis*, No. 98-2691, 1999 WL 463577 (7th Cir. July 9, 1999) (adopting similar analysis in rejecting Second Amendment claim on the merits, while recognizing individual's standing to assert that claim).

Petitioners disagree (Pet. 9-15) with that long-standing consensus, arguing that the Second Amendment does in fact create an individual right to possess firearms quite apart from any relationship to the maintenance of a well regulated state militia. Whether

or not that issue might someday warrant further consideration by this Court, this case would be an inappropriate vehicle for addressing it, because the Court has squarely held that convicted felons such as petitioners have no constitutional right to possess firearms. In *Lewis*, this Court rejected a constitutional challenge to the predecessor of 18 U.S.C. 922(g)(1), explaining that "Congress could rationally conclude that *any* felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." 445 U.S. at 66 (emphasis added). Referring explicitly to the Second Amendment, the Court concluded that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Id.* at 65 n.8. Petitioners' Second Amendment argument is irreconcilable with that holding.

2. Petitioners also claim (Pet. 15-16) that their federal firearms disability violates the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As petitioners appear to acknowledge (Pet. 17), however, the courts of appeals have consistently rejected any argument that the Ninth Amendment somehow creates rights of access to firearms. See, *e.g.*, *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996); *United States* v. *Broussard*, 80 F.3d 1025, 1041 & n.11 (5th Cir.), cert. denied, 519 U.S. 906 (1996).

Moreover, the premise of the specific Ninth Amendment argument presented here is foreclosed by this Court's precedent. Petitioners argue that, even though they were convicted of felonies under federal law,

"principles of federalism" preclude the imposition of federal firearms restrictions now that Louisiana has (they allege) restored their civil rights under *state* law. See Pet. 15-22. In *Beecham* v. *United States*, 511 U.S. 368 (1994), however, this Court held that once an individual has been convicted under federal law, only a *federal* pardon or civil rights restoration, and not a state pardon or civil rights restoration, can relieve him of his federal disabilities. *Id.* at 370-374. As petitioners observe (Pet. 19-20), the Court "express[ed] no opinion" on *how* (if at all) a federal felon can secure the restoration of his civil rights under federal law. 511 U.S. at 373 n.*. That question, which the Court deemed immaterial to its holding, has no bearing on the question presented here: whether the restoration of a felon's civil rights under state law necessarily removes any federal firearms disability. Again, *Beecham* answers that latter question in the negative. See also *id.* at 373 ("Many jurisdictions have no procedure for restoring civil rights. * * * Under our reading of the statute, a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights.").[2]

3. Finally, petitioners argue (Pet. 17; see Pet. 20-22) that, in enacting Section 922(g)(1), Congress "has exceeded its powers under the Commerce Clause." See U.S. Const. Art. I, § 8, Cl. 3. But, unlike the federal firearms prohibition invalidated in *United States* v. *Lopez*, 514 U.S. 549 (1995), Section 922(g) contains an

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[2] Petitioners' related arguments under the Tenth Amendment (see Pet. 17) are similarly without merit. Moreover, petitioners did not invoke the Tenth Amendment at any point in the proceedings below, and they have therefore waived any Tenth Amendment argument in this Court.

explicit interstate commerce element that must be satisfied before a defendant can be convicted. See 18 U.S.C. 922(g) ("It shall be unlawful for any [qualifying] person * * * *to ship or transport in interstate or foreign commerce, or possess in or affecting commerce*, any firearm or ammunition; or to receive any firearm or ammunition *which has been shipped or transported in interstate or foreign commerce.*") (emphasis added). For that reason alone, as the courts of appeals have uniformly held, Section 922(g) is a valid exercise of Congress's authority under the Commerce Clause.[3] And, because Commerce Clause principles cannot support a challenge to Section 922(g), neither could they support a challenge to the disposition of petitioners' request for an exemption from that provision under Section 925(c).[4]

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[3] See, *e.g.*, *United States* v. *Abernathy*, 83 F.3d 17, 20 (1st Cir. 1996); *United States* v. *Sorrentino*, 72 F.3d 294, 296-297 (2d Cir. 1995); *United States* v. *Gateward*, 84 F.3d 670, 671-672 (3d Cir.), cert. denied, 519 U.S. 907 (1996); *United States* v. *Wells*, 98 F.3d 808, 811 (4th Cir. 1996); *United States* v. *Pierson*, 139 F.3d 501, 503-504 (5th Cir.), cert. denied, 119 S. Ct. 220 (1998); *United States* v. *Turner*, 77 F.3d 887, 889 (6th Cir. 1996); *United States* v. *Bell*, 70 F.3d 495, 497-498 (7th Cir. 1995); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995), cert. denied, 517 U.S. 1125 (1996); *United States* v. *Hanna*, 55 F.3d 1456, 1461-1462 (9th Cir. 1995); *United States* v. *Bolton*, 68 F.3d 396, 400 (10th Cir. 1995), cert. denied, 516 U.S. 1137 (1996); *United States* v. *McAllister*, 77 F.3d 387, 389-390 (11th Cir.), cert. denied, 519 U.S. 905 (1996); see also *Scarborough* v. *United States*, 431 U.S. 563 (1977) (construing predecessor to Section 922(g) to satisfy Commerce Clause); *United States* v. *Bass*, 404 U.S. 336 (1971) (same).

[4] Petitioners' request for mandamus on their Section 925(c) application rests on the premise that the Constitution shields them from the application of Section 922(g). See Pet. 25-27. That premise is false for the reasons discussed above. The petition presents no issue concerning whether, apart from any constitutional chal-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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lenge to Section 922(g), the district courts have authority to consider the statutory merits of Section 925(c) applications in the first instance. Compare *Owen* v. *Magaw*, 122 F.3d 1350 (10th Cir. 1997) (district court has no such authority); *Burtch* v. *United States Dep't of the Treasury*, 120 F.3d 1087 (9th Cir. 1997) (same); *United States* v. *McGill*, 74 F.3d 64 (5th Cir.) (same), cert. denied, 519 U.S. 821 (1996), with *Rice* v. *United States*, 68 F.3d 702 (3d Cir. 1995) (contra). In any event, even if the issue were presented, this Court's review would be unwarranted for the reasons set forth in our brief in opposition to certiorari in *McGill* v. *United States*, 519 U.S. 821 (1996) (No. 95-2015). (We have served counsel for petitioners with a copy of that brief.)